IN THE

Supreme Court of the United States

October Term 1942

No. 497 3

A. M. ANDERSON, RECEIVER OF NATIONAL BANK OF KENTUCKY, OF LOUISVILLE,

Petitioner,

v.

KATHERINE KIRKPATRICK ABBOTT, ADMINISTRATRIX WITH THE WILL ANNEXED, OF THE ESTATE OF DAVID J. ABBOTT, DECEASED, ET AL.,

Respondents.

REPLY BRIEF

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REPLY BRIEF

Respondents in their brief do not challenge, in any respect, the accuracy of petitioner's "Summary Statement." (See petition, pp. 2-8.) They do not claim that petitioner has unfairly stated "The Question Presented." (See petition, pp. 9, 10.) They do not contradict our statement that this Court has never directly passed on the question and their argument is not addressed to the question, which is:

> "Are the owners of an insolvent national bank relieved from individual liability or 'double assessment,'

under the then existing Federal statute because, shortly before the bank's failure, they organized a holding company and exchanged their bank shares for holding company shares?"

They do, however, set forth, unsupported by record references, except in one instance, their own so-called "Summary Statement of Facts." This statement makes no pretense of being complete. It omits all reference to many of the crucial undisputed facts. It redounds with irrelevant and misleading statements and erroneous conclusions not justified on the record,—a record, by the way, almost exclusively documentary and indisputable.

They say (respondent's brief, p. 1) that the National Bank of Kentucky had "an honorable career." Irrelevant though this statement is, we challenge it. [See Bank Examiners' Reports, R. 1275 to 1305; and the history of the Kentucky Jockey Club and Wakefield loans, and Kentucky Wagon overdrafts in the suits against directors for neglect and misfeasance; *Anderson* v. *Akers*, 7 F. Supp. 924; *Atherton* v. *Anderson*, 86 F. (2d) 518, cert. granted, 300 U. S. 652, and upon rehearing, 99 F. (2d) 883; see also the fraud and rescission suit, *BancoKentucky Receiver* v. *National Bank Receiver*, 281 Ky. 784, 137 S. W. (2d) 357; also observe record fact that dividends of only seventy-seven (77%) per cent have been paid to depositors.]

They stress (p. 2) the "declared" purposes of Banco-Kentucky, and make no reference whatever to the *real* purposes of Banco. They do this to create the impression that Banco was a great general business corporation and that its holding of bank stocks was an incidental part of its "declared" purposes. They try to augment this impression by saying (p. 3) that Banco "acquired various assets." It did not "acquire various assets." It acquired assessable bank stock. Banco was not a general business

corporation. It was nothing but a holding company for bank stocks (see petitioner's unchallenged summary statement with record references, petition, pp. 2 to 8, particularly pp. 6 and 7).

Respondents argue (p. 3) that because the stockholders and directors increased their investment when Banco was formed, in an amount beyond what their assessment would then have been, no liability exists. With this added investment they acquired an added interest in a whole chain of banks. To use their own words (Ex. 24-3, p. 1140) they made the added investment in order to get "new and profitable financial opportunities and connections." This correspondingly increased their contingent assessment liability. They also state on page 3 that over nine million dollars of new money was paid into Banco. They omit to state that over five million dollars of this amount came out of National Bank of Kentucky on loans made on the sole security of Banco stock and that over two million dollars of this amount was lost by the bank. They omit to state the significant fact that substantially all of this money went immediately to acquire other bank stocks.

In the first paragraph (p. 4) respondents seek to create the impression that the stock market crash of October, 1929, the depression which followed, and the Caldwell deal of 1930, coupled with "some unfavorable newspaper publicity" caused withdrawals and closed the bank. This is not correct. The Bank Examiners' reports for years had pointed out the precarious condition of the bank with reference to long-standing loans and overdrafts. These loans and overdrafts caused the bank's failure. The stock market crash had nothing to do with it. The Caldwell deal was never even consummated. The directors of the bank claimed that they never read the Bank Examiners' reports. If this be true their neglect of duty had a lot to

do with the bank's failure. In any event this is all irrelevant because the statutory assessment liability is not conditioned upon what caused the bank's failure.

Respondents at page 6 state the issue in this case as follows:

> "Whether the BancoKentucky Company was organized and carried on in good faith for the purposes declared in its charter and was not a mere holding company nor organized as an agency of its stockholders or for the purpose of shielding its stockholders from the double liability imposed by the Bank Act."

The facts are undisputed. Though Banco was authorized in its corporate charter to engage in all kinds of business it never engaged in any such business. The only business it engaged in was the acquisition of assessable bank shares. It was the merest shell of a corporation. Its officers were the bank officers (Ex. 23, pp. 1063-1099). Its directorate was the bank directorate (Ex. 23, pp. 1055-1056). It had no office employees and only three record books. (See petition for certiorari, p. 6.) It was "a mere holding company" and nothing else. One of its purposes was "shielding its stockholders from the double liability imposed by the Bank Act." Otherwise, why stamp the stock certificates "fully paid and non-assessable" and insert in the Articles of Incorporation a provision that the stockholders should not be liable for such an assessment? That this was intentional is evidenced by the letter of the President of the bank. (See petition, p. 18, for quotation printed in full, Ex. 27, p. 1262.) It is urged at page 9 of the respondent's brief that:

> "On two other occasions the petitioner obtained an adjudication that the BancoKentucky Company was the real and beneficial owner of the stock of the National Bank of Kentucky."

This is an argument to the effect that since the petitioner recovered a judgment from Banco he is precluded from doing so here; in other words, that the petitioner has made an election. Banco was the record owner of the bank stock. The respondents are the real or beneficial owners. This defense was disposed of by two different District Courts in favor of the petitioner: *Anderson* v. *Abbott*, 23 F. Supp. 265; *Anderson* v. *Atkinson*, 22 F. Supp. 853. From neither of these decisions did the respondents appeal. When the assessment was levied the Receiver, for the benefit of the respondents, undertook to collect as much of the assessment out of the meager assets of BancoKentucky as possible, on the theory that it was the record owner of the bank stock. But before doing so he wrote to each and every one of the respondents the following letter and sent it out by registered mail:

"Office of The Receiver
THE NATIONAL BANK OF KENTUCKY
Louisville, Kentucky

Louisville, Ky., March 20, 1931

As a stockholder in The BancoKentucky Company, you will please take notice, that the Comptroller of the Currency has on February 20, 1931, levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, payable at the Office of the Receiver, on or before April 1, 1931. A notice of such assessment and a demand for payment of the same has been served upon the receiver of the BancoKentucky Company as the holder of 540,484 trustees' participation certificates, issued under a certain trust agreement of April 22, 1927, which trustees' participation certificates represent the ownership of 37,721.624 shares of stock in The National Bank of Kentucky. You will, therefore, take notice that it is the intention of the undersigned, as Receiver of The National Bank of

Kentucky, to proceed against you for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said BancoKentucky Company, to the extent that the undersigned, as Receiver of The National Bank of Kentucky, is unable to collect said assessment from The Banco-Kentucky Company or its receiver.

PAUL C. KEYES,
Receiver of The National Bank of Kentucky
Louisville, Kentucky

Registered Letter
Return Receipt Requested" (R. I, p. 70.)

Thus, from the outset, the Comptroller of the Currency and the Receiver considered both the holding company and its shareholders liable for the assessment, the one as the record holder, the other as the actual or beneficial owner. In this the Comptroller and Receiver were supported by plenty of authority: *Metropolitan Holding Company* v. *Snyder*, 79 Fed. (2d) 263 (C. C. A. 8, 1935); *Corker* v. *Soper*, 53 Fed. (2d) 190 (C. C. A. 5, 1931), cert. denied, 285 U. S. 540 (1932); *Harris Investment Co.* v. *Hood*, 123 Fla. 598, 167 So. 25 (1936); *Nettles* v. *Sottile*, 184 S. C. 1, 191 S. E. 796 (1937); *Nettles* v. *Rhett*, 94 Fed. (2d) 42 (C. C. A. 4, 1938); *Flanagan* v. *Madison Square State Bank*, 302 Ill. App. 468, 24 N. E. (2d) 202 (1939); *Galinski* v. *Adler*, 302 Ill. App. 474, 24 N. E. (2d) 205 (1939).

Respondents' argument is predicated on their failure to recognize that both the holding company and its shareholders are liable and that the liability is not in the alternative. Where both are liable suit and judgment against one, in the absence of satisfaction, does not affect the right to proceed against the other. Respondents' whole contention is well answered in *Ericson* v. *Slomer*, 94 Fed. (2d) 437 (C. C. A. 7, 1938):

"It is our conclusion that the receiver of a national bank has a right to proceed against both the record and actual owner of the shares of stock in an attempt to collect the liability thereupon imposed. It seems both logical and reasonable that such procedure should be permissible. Under well-established law, both are liable. As to who shall carry the burden as between them is a matter with which we are not here concerned. Why should the receiver, at his peril, be required to select the one against whom he is to proceed and why should a proceeding against one be a bar to a proceeding against the other? He should not be so required and neither should either of the parties whom the law makes liable be permitted to shield himself from such liability by asserting an unsatisfied judgment has been obtained against the other. To hold otherwise is to lay down the bars so that fraud may be committed upon the creditors of the bank. There can be required only one satisfaction of the stock liability. A judgment against either and a satisfaction, of course, would constitute a bar to a judgment against the other. A partial satisfaction would constitute a bar pro tanto." [94 Fed. (2d) 437, 441.]

For reasons set forth here and in the petition for writ of certiorari it is respectfully submitted that the petition should be granted.

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